No. 44219-1-II

In the Washington State Court of Appeals, Division II

State of Washington, Respondent,

vs.

Todd R. Johnson, Appellant.

Appellant's Reply Brief

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I. Mr. Johnson did not fail to preserve his claim regarding the trial court's failure to give a "defense of property" instruction.

A. Mr. Johnson did not fail to propose a "defense of property" instruction where the instruction was before the trial court in the prosecutor's instructions, and Mr. Johnson requested the instruction on the record.

The State argues that Mr. Johnson is barred from assigning error to the trial court's refusal to give a "defense of property" instruction because he did not include that instruction in his packet of proposed instructions at trial, nor did he formally adopt the version prepared by the prosecutor. State's Resp. at 13-14.

"A technical violation of the rules will not ordinarily bar appellate review where justice is to be served." *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 613, 1 P.3d 579 (2000) (citing *Green River Comty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986)). A party must make the trial court "sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial." *Id.* at 615. "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Id.* (quoting *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993)).

Compliance with the purpose of the rule excuses technical nonconformity in certain circumstances. *Id.* (quoting *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994)).

Here, the record indicates that Mr. Johnson did not include a "defense of property" instruction in his packet of proposed instructions to the trial court, CP at 10-14, but the prosecutor did. CP at 4. However, Mr. Johnson argued at length as to why the trial court should give the "defense of property" instruction, citing the testimonial evidence that had been elicited in support of such an instruction. Mr. Johnson's[1] VRP (Sept. 19) at 4-6. He further informed the trial court that he had a right to argue all theories of the case supported by the evidence. *Id.* at 5:18-20 ("Regarding the theory of the case, I know that we're allowed to argue the theories of the case that the evidence has been proposed.").

The trial court then asked the prosecutor to point out the instruction in question, and the prosecutor obliged. *Id.* at 8:8-16. The prosecutor then asked the trial court to delete all of the language from the instruction "except the language that pertains to self-defense." *Id.* at 9:8-10. Thus, the trial court had the proposed instruction before it in writing, and was fully informed by Mr. Johnson as to why the instruction should be given and what evidence supported the instruction. Mr. Johnson complied

[1] To distinguish from the State's verbatim reports of proceedings.

with the purpose and the spirit of the rule, if not the exact technical nature of it. The trial court had sufficient opportunity to correct its error. Therefore, the issue is preserved for review.

B. Mr. Johnson did not fail to object to the trial court's refusal to give a "defense of property" instruction.

The State argues that Mr. Johnson is barred from assigning error to the trial court's refusal to give a "defense of property" instruction because he failed to object. State's Resp. at 15-18. Contrary to this assertion, the record reveals that Mr. Johnson argued at length for the inclusion of a "defense of property" instruction. Mr. Johnson's VRP (Sept. 19) at 4-6. The trial court denied the request. *Id.* at 10-11. This occurred on the record, during formal arguments over the jury instructions, and immediately before the trial court went over all of the instructions one-by-one. *Id.* Mr. Johnson had already made his position and his objections known during argument. *Cf. Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 641, 806 P.2d 766 (1991) (quoting *State v. Ramirez*, 46 Wn. App. 223, 229, 730 P.2d 98 (1986)) ("[U]nless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion *in limine* has a standing objection."). Also, the trial court clearly understood Mr. Johnson to have objected to its refusal to provide a "defense of property" instruction when it later commented:

"Okay. So you're withdrawing your objection." State's 7 RP at 48. Therefore, Mr. Johnson did not fail to object to the trial court's refusal to give a "defense of property" instruction.

II. Mr. Johnson did not waive the "defense of property" instruction.

The State argues that Mr. Johnson affirmatively waived the "defense of property" instruction during a colloquy with the trial court. State's Resp. at 18-20. The colloquy proceeded as follows:

> Mr. Smith: And Your Honor, I've been thinking about it. I actually don't think -- I think that I'm fine with the instruction the way that the Court has rewritten the self-defense instruction. It allows me to get what I want. I don't think it's that --
>
> Court: Okay. So you're withdrawing your objection.
>
> Mr. Smith: I'll withdraw my -- I just want to make -- I am actually happy to move along. I don't think the case law is going to give me anything. It gives me everything I want to argue. It's -- we're prepared to go, and I think I'd rather just have that ready to go. I just want to make sure the Court's aware.

State's 7 RP at 48-49.

Contrary to the State's argument, at no point during this colloquy does Mr. Johnson affirmatively waive the "defense of property" instruction. Mr. Johnson had requested the instruction, provided adequate reasoning and argument on why it should be given, and the trial court denied the request. Mr. Johnson's VRP (Sept. 19) at 4-6; 10-11. Mr.

Johnson was simply indicating that he did not think there was any relevant case law that needed citing. Although he began with "I'll withdraw my --," Mr. Johnson did not finish that thought and did not withdraw the objection. He was simply informing the court that no case law or further argument would be forthcoming, and that the trial could proceed to the reading of the instructions and closing arguments. Therefore, Mr. Johnson did not affirmatively waive the "defense of property" instruction.

III. The trial court erred when it refused to give a "defense of property" instruction.

As an initial matter, the State first argues that the trial court did not err because its refusal to give a "defense of property" instruction was within the range of acceptable choices since Mr. Johnson did not request the instruction, did not object to the instruction, and later affirmatively waived the issue. State's Resp. at 21-22. This argument is essentially a rehashing of its previous arguments and Mr. Johnson's response appears *supra*, sections I & II.

The State next argues the trial court did not err because defense of property was not Mr. Johnson's theory of the case. State's Resp. at 22. In support, it cites Mr. Johnson's response to the trial court when the court asked if he had any case law: "I don't because it was just an issue that was raised a second ago." State's 6 RP at 5. However, the State cites no

authority whatsoever that every single theory of the case must exist at the beginning of the case and continue unchanged all the way through. Mr. Johnson elicited sufficient evidence during testimony that supports a "defense of property" instruction, discussed next. Therefore, this argument is without merit.

> A. There was sufficient evidence introduced at trial to warrant a defense of property instruction where Mr. Johnson testified that he ran to confront Mr. Haltom because he saw Mr. Haltom hitting Mr. Johnson's dogs with a canoe paddle while Mr. Haltom was standing on Mr. Johnson's property.

1. Malicious trespass

The State first argues that there was insufficient evidence introduced at trial to support the "to prevent malicious trespass with real property" portion of the "defense of property" instruction because Mr. Haltom was in the water, and there was no evidence presented during trial that the water belonged to Mr. Johnson. State's Resp. at 24-25. On the contrary, Mr. Johnson testified that when he approached from the side of the house, he saw Mr. Haltom's canoe beached on Mr. Johnson's property, and Mr. Haltom standing "towards the front of his canoe." Mr. Johnson's VRP (Sept. 18) at 34. Thus, there was sufficient evidence to support the malicious trespass portion of the "defense of property" instruction.

2. Defense of dogs

The State argues that the evidence in the record shows that Mr. Johnson had used force to defend himself, rather than his dogs. State's Resp. at 25-28. This is so, according to the State, because Mr. Johnson testified that the dogs had run away when they saw Mr. Johnson running toward the beach. *Id.* at 27.

Mr. Johnson did testify, however, that he saw Mr. Haltom hitting the dogs, which is what prompted his run to the shoreline to confront Mr. Haltom. Mr. Johnson's VRP (Sept. 18) at 34-35. Thus, what the State misses is that even if the dogs had dispersed by the time Mr. Johnson reached the point of confrontation, the "defense of property" instruction explains why Mr. Johnson has a right to be the first aggressor.

Without that instruction, the jury could have believed Mr. Johnson's recounting of the events 100% and still deemed him the primary aggressor for running toward the confrontation. Had the jury been instructed on defense of property, it would have been able to use either the malicious trespass, the beating of the dogs, or both, to find that Mr. Johnson's act of running toward the confrontation was lawful.

The jury's verdict supports this argument. The jury found Mr. Johnson guilty of the lesser included assault in the fourth degree. There was uncontroverted evidence at trial that Mr. Haltom had sustained four

broken ribs. Narrative Report of Proceedings (NRP) at 4:5-10. The trial court instructed the jury that "fracture of any bodily part" constitutes substantial bodily harm. CP at 31. If the jury rejected Mr. Johnson's self-defense theory in whole, the jury would have found him guilty of assault in the second degree as charged. What's more likely is that the jury decided to find Mr. Johnson guilty of the lesser included assault in the fourth degree because it found partially for Mr. Johnson. Had the jury been correctly instructed on defense of property, the jury may have acquitted Mr. Johnson in whole.

"[T]he trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is *completely* unsupported by the evidence. At the very least, the instructions must reflect a defense arguably supported by the evidence." *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010) (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)) (internal citation omitted). There was sufficient evidence introduced at trial to support a "defense of property" instruction and the trial court erred by not giving that instruction.

B. The error is not harmless.

"To warrant reversal, an error must be prejudicial to a substantial right of the party convicted. Where, as here, a constitutional error-denial

of [the defendant's] due process right to have his defense theory presented to the jury-benefitted the prevailing party, namely the State, there is a rebuttable presumption that the error was harmful." *Id.* at 40 (internal citations omitted). The State must prove beyond a reasonable doubt that the jury would have reached the same verdict even with the disputed instruction. *Id.* (citing *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)).

The State quotes *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010), for the proposition that if an instruction is misleading, the complaining party must show prejudice. State's Resp. at 28. However, the issue before the Court in this case is not whether an instruction was *misleading*, but rather that it was missing in its entirety. Regardless, case law from this Court and the Washington Supreme Court holds that a rebuttable presumption of prejudice arises when a defendant cannot present his theory of the case to a jury and the State must overcome this presumption beyond a reasonable doubt.

Here, the State cannot overcome the presumption beyond a reasonable doubt. In fact, it essentially concedes that there was evidence supporting the "defense of property" theory of the case when it states: "Defendant now claims that, had he been allowed to instruct the jury on defense of property, of which there is *substantially less* evidence, the same

jury would return a different verdict." State's Resp. at 29. The State does not contend that there was *no* evidence, but *substantially less*. Rather, it argues that because Mr. Johnson presented "substantially more" evidence of self-defense and he was the sole witness to testify that he acted to protect his dogs, that somehow equates to a showing, beyond a reasonable doubt, that the jury would have found him guilty even with the "defense of property" instruction. Contrary, the jury may have found for Mr. Johnson only partially specifically because it was not instructed on the "defense of property" theory. *See supra*, section III-A-2.

The State cannot, and has not, shown beyond a reasonable doubt that the jury would have found Mr. Johnson guilty had it been instructed on defense of property. Therefore, the error is not harmless.

CONCLUSION

Mr. Johnson requested a defense of property instruction. He objected, and did not waive his request. Sufficient evidence supports the instruction. The trial court's error in not giving the instruction is not harmless. Therefore, this Court should reverse and remand for trial.

Respectfully submitted,

Date: 10/11/2013

___/s/_____
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